

Claimant appeared by his attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent and one of its insurance carriers, Insurance Company of North America, appeared by their attorney, Richard J. Liby appearing for Vincent A. Burnett of Wichita, Kansas. Respondent and another of its insurance carriers, Fireman's Fund Insurance Company, appeared by their attorney, David S. Brake of Chanute, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the parties' stipulations as contained in the Award.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date or dates alleged?
- (2) Did claimant provide timely notice of a series of accidents occurring through his last day worked on approximately October 5, 1996?
- (3) Did claimant submit timely written claim pursuant to K.S.A. 44-520a for the accidents occurring on August 1, 1994, and in August 1995?
- (4) What is the nature and extent of claimant's injury or injuries and disabilities as they relate to the various injuries alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for respondent in 1990 as a laborer. On approximately August 1, 1994, while opening the doors of a truck, claimant slipped off of the frame, slid backwards and landed on the pavement. He injured his low back at that time. Claimant went to the Labette County Medical Center emergency room the next day. That is the only treatment claimant ever received for that injury. Claimant returned to work for respondent, performing his regular duties, although, in his opinion, his job duties became lighter as he began working more with equipment and less as a laborer. He also began driving a truck more often.

On August 16, 1995, claimant fell over a box while stomping down trash. This incident was also reported to respondent, who referred claimant to John P. Lakin, D.C., a local chiropractor, for treatment. Claimant received approximately ten treatments for that condition. The dates of those treatments are not in the record.

Claimant again returned to work for respondent, working his regular duties. On approximately October 5, 1996, claimant put grease on a door handle at work as a prank. As a result of that incident, claimant was suspended from employment. On approximately

October 21, 1996, while at home on suspension, claimant suffered a new and separate injury while moving firewood in his backyard. Claimant heated his home with firewood. Immediately after the firewood incident, claimant was forced to seek medical treatment with Kevin M. Mosier, M.D., a board certified orthopedic surgeon. Dr. Mosier examined claimant shortly after the October 21, 1996, incident. Claimant, at that time, had low back and left leg pain which Dr. Mosier described as severe. Claimant also had complaints of numbness in his left leg. An MRI taken at that time displayed a large herniated nucleus pulposus at L5-S1 which the doctor felt was consistent with the symptoms described by claimant. Dr. Mosier performed a lumbar discectomy on claimant on October 25, 1996, and claimant was discharged from the hospital on October 28, 1996.

Respondent contends that claimant's need for surgery and ongoing treatment in October 1996 stems from the home firewood incident rather than any prior problems connected with work. Respondent further contends, as claimant did not file his E-1 for any of the accidents until November 20, 1996, and no written claim was submitted for the 1994 or 1995 accidents prior to that time, that claimant has failed to submit timely written claim on the 1994 and 1995 accidents.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to the benefits requested by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 1995 Supp. 44-508(g). In this instance, claimant alleges three separate accidental injuries. Claimant alleges a specific trauma on August 1, 1994, a second specific trauma on August 16, 1995, and a series of accidents through October 5, 1996, his last day worked before the suspension.

Two medical depositions were taken in this matter for the purpose of obtaining both impairment ratings and discussing the causation issues which are before the Board. Dr. Mosier, the treating physician, testified that, when he did the surgery, he found a fresh disc herniation in claimant's back. He stated that this condition would have occurred within approximately one to two weeks time as there was no scarring in or around the disc. He felt it unlikely that that disc herniation resulted from anything which occurred one or two years before. At the outside, he opined the disc herniation occurred no more than two weeks prior to the surgery. He also reviewed the CT scans taken in August 1994, which showed no compression on the spinal column and no disc herniation at that time. In addition, he had the opportunity to review lumbar spine x-rays taken in August 1994. He testified that those showed a lack of herniation at that time. Based upon his examination of claimant and the findings during the surgery, Dr. Mosier testified that, in his opinion, the firewood incident was the cause of the disc herniation.

Claimant was also examined by orthopedic surgeon Edward J. Prostic, M.D., at the request of his attorney on June 22, 1999. Dr. Prostic testified that, in his opinion, the 1994 incident was the underlying condition, but that the firewood incident was the precipitating cause of the surgery.

Dr. Prostic did somewhat disagree with Dr. Mosier in that he testified it was not possible to pinpoint the timing of a disc herniation within two weeks or less. He felt that was beyond both his and Dr. Mosier's capabilities. He did, however, testify that it would be possible to determine whether a disc herniated within the previous three to six months. This testimony, while perhaps somewhat discrediting Dr. Mosier, also supports Dr. Mosier's testimony that the disc herniation did not occur as a result of either the 1994 or 1995 incidents, as both were well beyond the six-month maximum time limit set by Dr. Prostic.

In considering the evidence, the Appeals Board finds that claimant has not proven that the accidental injury of October 1996 occurred as a result of his employment with respondent. Claimant has also failed to prove accidental injury arising out of and in the course of his employment through a series of accidents occurring through October 5, 1996, his last date worked.

In addition, K.S.A. 44-520a requires that, before a claim for compensation may be maintained under the Workers Compensation Act, a written claim for compensation must be served upon the employer within 200 days of the date of accident or the last furnishing of compensation. Claimant alleges accidental injury in August 1994 and again in August 1995, but failed to provide written claim until November 20, 1996. While it is acknowledged in the record that claimant was receiving chiropractic treatments from Dr. Lakin after the 1995 incident, those records were not placed into evidence and it is unclear from the record when those chiropractic treatments were provided. The Appeals Board, therefore, finds that claimant has failed to prove that he submitted timely written claim for either the August 1, 1994, or August 16, 1995, injuries suffered while employed with respondent. Additionally, the evidence does not support claimant's claim that his need for surgery stems from either the 1994 or 1995 incidents. The testimony of Dr. Mosier is specific regarding the involvement of claimant's firewood lifting activities. In addition, even Dr. Prostic, claimant's hired expert, agreed that the lifting of the firewood was the precipitating cause of the surgeries claimant underwent in 1996. The Appeals Board, therefore, finds that claimant has failed to carry his burden in the above matter and the Award of the Administrative Law Judge denying claimant benefits should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated August 14, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
David S. Brake, Chanute, KS
Richard J. Liby, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director